

SERVED: November 5, 2015

NTSB Order No. EA- 5760

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 2015

In the matter of)
JOHN MARVIN HORNBECK,)
Appellant.) Docket NA-30001

In the matter of)
THOMAS ANDREW DUBROUILLET,)
Appellant.) Docket NA-30002

In the matter of)
ROBERT DAIL GIBBONS,)
Appellant.) Docket NA-30003

| | | |
|------------------------|---|-----------------|
| _____ |) | |
| |) | |
| In the matter of |) | |
| |) | |
| DANIEL HARRISON KIGHT, |) | |
| |) | Docket NA-30004 |
| Appellant. |) | |
| |) | |
| _____ |) | |
| _____ |) | |
| |) | |
| In the matter of |) | |
| |) | |
| EDWARD LYNN LEGGETTE, |) | |
| |) | Docket NA-30005 |
| Appellant, |) | |
| |) | |
| _____ |) | |
| _____ |) | |
| |) | |
| In the matter of |) | |
| |) | |
| GREGORY JAMES REESE, |) | |
| |) | Docket NA-30006 |
| Appellant, |) | |
| |) | |
| _____ |) | |
| _____ |) | |
| |) | |
| In the matter of |) | |
| |) | |
| THADDEUS SARGENT, |) | |
| |) | Docket NA-30007 |
| Appellant, |) | |
| |) | |
| _____ |) | |

Docket NA-30008

Docket NA-30009

¹ A copy of the chief law judge’s order is attached. Although the chief law judge did not consolidate the appeals, his Order applied to each of the above-listed cases. Order Not Accepting Appeals for Lack of Jurisdiction at 3 n.1. The parties also grouped the cases together in their briefs. As a result, this Opinion and Order applies to all of the nine above-listed cases.

On April 10, 2015, the Alabama and Northwest Florida Flight Standards District Office (FSDO) of the Federal Aviation Administration (FAA) sent letters to the appellants stating an incident at the Tuscaloosa Air Show on March 29, 2015 in Tuscaloosa, Alabama, caused the FAA to rescind appellants' SACs, which appellants possessed pursuant to FAA Form 8710-7 ("Statement of Acrobatic Competency").² The letters requested appellants return their SACs to the FSDO listed on the letter. The letters further stated appellants had the opportunity to "appeal this action in writing" to the Division Manager, General Aviation and Commercial Division (AFS 800), at FAA headquarters in Washington, D.C.³ The letters stated the March 29, 2015 incident was "still under investigation to determine whether enforcement action is appropriate."⁴ The letters advised appellants that if the FAA commenced an enforcement action, appellants would be advised in a separate letter.

On April 17, 2015, appellants sent appeals to FAA headquarters, pursuant to the instructions on the letters. On April 29, 2015, appellants also sent appeals to the NTSB Office of Administrative Law Judges. The Administrator responded to the letters of appeal appellants had addressed to the NTSB on June 30, 2015, by stating the Board did not have jurisdiction to review the Administrator's letters of rescission concerning appellants' SACs.

B. *Chief Law Judge's Order*

On July 2, 2015, the Chief Administrative Law Judge served on appellants the Order Not Accepting Appeals for Lack of Jurisdiction. The order concludes the Board lacks jurisdiction to review appellants' assertions that the Administrator's rescission of their SACs amounts to a due

² Letters from Linda E. Silvertooth, Manager, Alabama and Northwest Florida FSDO (April 10, 2015). All the letters, addressed individually to each appellant, contained identical text.

³ Id.

⁴ Id.

process violation. The order concludes SACs are not comparable to certificates or ratings, over which the Board unequivocally possesses jurisdiction. The order quotes from 49 U.S.C. §§ 1133, 44703, and 44709, which comprise the statutory scheme under which the Board exercises its appellate jurisdiction.⁵ The relevant portions of these sections provide as follows:

§ 1133. Review of other agency action

The National Transportation Safety Board shall review on appeal—

(1) the denial, amendment, modification, suspension, or revocation of a certificate issued by the Secretary of Transportation under section 44703, 44709, or 44710 of this title;

(2) the revocation of a certificate of registration under section 44106 of this title;

* * * * *

(4) under section 46301(d)(5) of this title, an order imposing a [civil] penalty under section 46301.

§ 44703. Airman certificates

* * * * *

(d) APPEALS.— (1) A person whose application for the issuance or renewal of an airman certificate has been denied may appeal the denial to the National Transportation Safety Board.

§ 44709. Amendments, modifications, suspensions, and revocations of certificates

* * * * *

(b) ACTIONS OF THE ADMINISTRATOR.— The Administrator may issue an order amending, modifying, suspending, or revoking—

(1) any part of a certificate issued under this chapter [(i.e., 49 U.S.C. Chapter 447, Safety Regulation)] if—

(A) the Administrator decides after conducting a re-inspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action;

* * * * *

(d) APPEALS.— (1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board.

The law judge explained that under § 44703(d)(1), the Board has the authority to review the Administrator's denial of issuance of an airman certificate. The law judge further explained that both §§ 44703(d)(1) and 44709(b) and (d) refer to airman certificates.

⁵ Order Not Accepting Appeals for Lack of Jurisdiction at 5-6 (footnotes omitted).

The law judge further referenced 49 U.S.C. §§ 44710 and 44106, which require revocation of an airman certificate and registration certificates of aircraft upon conviction of a narcotics felony. Both §§ 44710 and 44106, the law judge summarized, provide a right of appeal to the NTSB when an individual's or an aircraft's certificate is revoked. Finally, the law judge referenced 49 U.S.C. § 46301(d)(5), which provides the Administrator may issue orders of civil penalty against individuals acting as pilots, flight engineers, mechanics and repairmen upon certain circumstances. The law judge's order concluded this synopsis with the statement, "[t]his is the full extent to which the Board is authorized by statute to exercise review authority over FAA actions."⁶

In his order, the law judge compared SACs to airman certificates or ratings, as described in 49 U.S.C. § 44709(b)(1), and determined that SACs do not meet the requirements of § 44709(b)(1). For example, the law judge stated SACs do not include an address or a description (date of birth, sex, height, weight, and hair and eye color). In addition, the law judge noted each SAC does not contain a unique number as an airman certificate does. The law judge's order also mentions, in contrast to airman certificates, 49 C.F.R. part 61 of the Federal Aviation Regulations contain no standards or procedures for issuance of SAC. The law judge cited two Opinions and Orders in which the Board held it had neither the authority to review the Administrator's withdrawal of one's authority to serve as a check airman for a carrier,⁷ nor did the Board have jurisdiction to review the Administrator's denial of an individual's request for an "authorization" in lieu of a rating.⁸ Based on these considerations, the law judge concluded SACs are not comparable to airman certificates under § 44709(b)(1).

⁶ Id. at 6.

⁷ Id. at 8 (citing In re Daisey, NTSB Order No. EA-4939 (2002)).

⁸ Id. (citing Petition of Thornton, NTSB Order No. EA-4238 (1994)).

In further support of his determination, the law judge described an SAC is not always required for acrobatic operations: specifically, the law judge's Order includes the statement, "while pilots are required to obtain an SAC to perform acrobatic maneuvers at air shows, they are not compelled to obtain one to perform such maneuvers *per se*."⁹ The law judge noted the procedure for obtaining an SAC involves standards developed by International Council of Airshows (ICAS) and the Experimental Aircraft Association (EAA) and typically involves completion of a form that may vary and/or completion of an evaluation. Such variability and utilization of a non-FAA form, the law judge stated, "strongly suggests that an SAC is not an airman certificate or rating."¹⁰ In conclusion, the law judge stated, even assuming the Board considers an SAC as a type of airman certificate, appellants did not exhaust their administrative remedies after receiving the FSDO's letters of rescission, because appellants did not wait for review of the rescissions by the FAA General Aviation and Commercial Division.

C. *Issues on Appeal*

Appellants filed an appeal of the law judge's order, principally on the basis that the law judge's dismissal of their appeals deprive them of due process.¹¹ Appellants contend ICAS is not an objective entity to recommend the Administrator rescind appellants' SACs, because the organization competes with appellants' air show organization, Team AeroDynamix; therefore, ICAS maintains a motivation to confiscate appellants' SACs. Appellants, in their appeal brief,

⁹ Id. at 8 (citing FAA Order 8900.1, Ch. 9, § 1, ¶ 5-1549(B)).

¹⁰ Id.

¹¹ The Constitution's due process clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In general, we have held that when a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, neither the law judge nor the Administrator has denied the respondent due process of law. See, e.g., Administrator v. Nadal, NTSB Order No. EA-5308 at 7 n.6 (2007).

also argue the Administrator sought to require them to enter into an indemnification agreement with ICAS, and that the agreement is so unjust that it violates 5 U.S.C. § 2302.¹²

Furthermore, appellants point out three specific statements they believe are incorrect in the chief law judge's order. First, appellants imply a definition of "air show" is necessary to understand the statement, "while pilots are required to obtain an SAC to perform acrobatic maneuvers at air shows, they are not compelled to obtain one to perform such maneuvers *per se*."¹³ Second, appellants contend the chief law judge's statement that rescissions of SACs are not intended to be punitive is incorrect. Third, appellants assert the chief law judge erred in finding the matter was not ripe for review, because the chief law judge did not know of the "illegal indemnification requirement required by the FAA" when he issued his Order.

Finally, appellants contend the instant matter is appropriate for NTSB review because the NTSB is authorized to issue safety recommendations and "conduct special studies on safety problems. This is a safety problem."¹⁴

2. Decision

We review the chief law judge's order *de novo*.¹⁵ Although the appeals arise out of an order dismissing them for lack of jurisdiction, our Rules of Practice provide we may review such

¹² Section 2302(b), titled "Prohibited Personnel Practices," contains a listing of admonitions against specific practices that conflict with merit systems principles governing the management of the Federal Executive workforce. The United States Office of Special Counsel oversees enforcement of the prohibitions.

¹³ Order Not Accepting Appeals for Lack of Jurisdiction at 8.

¹⁴ Appeal Br. at 4.

¹⁵ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

an order to determine whether the conclusions the chief law judge made were in accordance with law, precedent, and policy.¹⁶

A. *SACs and NTSB Review*

We agree with the chief law judge’s synopsis of the statutory scheme that contains the NTSB’s responsibility and authority to review aviation certificate enforcement appeals. As the chief law judge noted, 49 U.S.C. § 1133 refers to various sections within 49 U.S.C. ch. 447. The sections to which 49 U.S.C. § 1133 refers do not indicate the NTSB has authority to review appeals of documents other than certificates or associated authorizations, such as ratings.

A careful review of the procedure by which the Administrator issues SACs indicates an SAC is distinguishable from a certificate or a rating.¹⁷ Unlike the procedure for obtaining an airman certificate under 49 C.F.R. part 61, an airman who already holds a certificate may obtain an SAC after submitting an application to either ICAS or the EAA—Warbirds of America. The application must contain a review from an acrobatic competency evaluator, who may recommend endorsements or limitations. Therefore, SACs do not provide authority to an individual to act as an airman.¹⁸ Instead, the purpose of the SAC is more analogous to an agreement between the Administrator and the airman than to a certificate: the SAC functions as evidence of an airman’s general competency to perform certain maneuvers, such as wing-walking or landing on top of a car.¹⁹ The text on the SAC states the SAC does not excuse its

¹⁶ 49 C.F.R. § 821.49(a)(2).

¹⁷ FAA Order 8900.1, vol. 5, ch. 9, § 1.

¹⁸ Title 49 U.S.C. § 40102(a)(8)(A) defines “airman” as “an individual ...in command, or as pilot, mechanic, or member of the crew, who navigates aircraft when under way.”

¹⁹ FAA Order 8900.1, vol. 5, ch. 9, § 1, Fig. 5-166(A) (providing a listing of “maneuver limitations for use in completing FAA Form 8710-7,” and stating under the ICAS Program, an airman who holds a SAC is considered qualified to perform any of the 20 activities listed, such as various types of solo aerobatics, formation aerobatics, circle the jumper, night pyro, car to

holder from complying with the Federal Aviation Regulations; however, it serves as an indication of the holder's skill and ability to perform certain maneuvers that otherwise may require a waiver or some type of special permission from the Administrator.

When reading the chief law judge's Order in this context, we do not find persuasive respondent's contention that the chief law judge erred in stating, "while pilots are required to obtain an SAC to perform acrobatic maneuvers at air shows, they are not compelled to obtain one to perform such maneuvers *per se*."²⁰ Although not explicitly stated in FAA Order 8900.1, SACs indicate an airman's ability to perform acrobatic maneuvers safely under 49 U.S.C. § 44701(f), which governs air show waivers.²¹ In addition, as the chief law judge summarized in detail, SACs do not contain unique numbers or other information that 49 U.S.C. § 44709(b)(1) requires.²² In sum, SACs are not airman certificates or any other authorization over which the

(..continued)

plane transfer, aerial transfer, comedy, dogfight, deadstick, and inverted ribbon cut, or any other maneuver pre-approved by the industry evaluation committee).

²⁰ Order Not Accepting Appeals for Lack of Jurisdiction at 8.

²¹ Reply Br. at 9. Section 44701, which sets forth general requirements for the FAA, provides, in part, as follows:

(f) EXEMPTIONS.—The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702–44716 of this title if the Administrator finds the exemption is in the public interest.

The Board does not have authority to review the Administrator's granting or denial of an air show waiver, or any other exemption under § 44701(f).

²² Section 44709(b)(1) states:

(b) CONTENTS.—(1) An airman certificate shall—
 (A) be numbered and recorded by the Administrator of the Federal Aviation Administration;
 (B) contain the name, address, and description of the individual to whom the certificate is issued;
 (C) contain terms the Administrator decides are necessary to ensure safety in air commerce, including terms on the duration of the certificate, periodic or special examinations, and tests of physical fitness;

Board has authority to review. Contrary to appellants' argument, the chief law judge's lack of a definition of "air show" does not alter this conclusion, as the plain language of our authority to review certificate actions contains no reference to air shows.

Furthermore, to the extent appellants contend our authority to issue safety recommendations and conduct safety studies should extend to review of appeals of SAC denials or re-evaluations, we disagree. The Board's authority to review appeals of certificate and rating enforcement actions, as codified at 49 U.S.C. § 1133, includes no reference to the Board's authority to engage in any other actions to improve or promote transportation safety. Overall, consistent with the foregoing analysis, the Board lacks jurisdiction to consider appellants' assertions.

B. *Due Process*

The Constitution's due process clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." Appellants contend the due process clause entitles them to an appeal under the Board's statute and Rules of Procedure. Based on our determination that SACs are readily distinguishable from airman certificates, and 49 U.S.C. § 1133 therefore does not compel us to entertain appellants' appeal, we conclude appellants' due process argument is inappropriate in this forum.

We read appellants' contention that the chief law judge erred in stating rescissions of SACs are not intended to be punitive as relevant to their due process argument. For clarification, we note FAA Order 8900.1 includes the following text:

(..continued)

(D) specify the capacity in which the holder of the certificate may serve as an airman with respect to an aircraft; and

(E) designate the class the certificate covers.

A. High Standard of Safety. These actions are only intended to achieve a high standard of safety by assuring future compliance with FAA safety rules and policy. They are not intended to be punitive, and are separate, apart from, and may not necessarily relate to any enforcement action or the final determination of probable cause of an accident.²³

As explained above, to the extent appellants intend to assert the rescission of a SAC is inevitably punitive, notwithstanding the text of FAA Order 8900.1, we lack the authority to review such an argument.

C. Indemnification Agreement

Appellants further contend the indemnification agreement into which they entered with ICAS is unconscionable, because ICAS maintains a motive to promote the confiscation of their SACs. The enforceability and validity of the agreement between Team AeroDynamix and ICAS is outside the purview of the Board's review. The Board is without jurisdiction to review and consider a remedy for contract-related arguments.

Appellants' contentions regarding the indemnification agreement are relevant to their assertion that the chief law judge erred in finding the matter was not ripe for review, because the chief law judge did not know of the "illegal indemnification requirement required by the FAA" when he issued his order dismissing the appeal.²⁴ However, the chief law judge's order clearly states, assuming the NTSB had authority to review the matter, it would not be ripe for the NTSB's review under 49 U.S.C. § 1133 because appellants have not exhausted their appeal of rescission of the SACs with the Administrator. As mentioned above, FAA Order 8900.1 provides an appeal process for SAC rescissions.²⁵ Even if the chief law judge, at the time of his order,

²³ FAA Order 8900.1 vol. 5, ch. 9, § 1, at ¶ 5-5115.

²⁴ Appeal Br. at 4.

²⁵ FAA Order 8900.1 vol. 5, ch. 9, § 1, at ¶ 5-1551(D) (stating, "[a] performer who has been requested to submit to reevaluation and/or had their FAA Form 8710-7 rescinded shall have the right to appeal this action in writing to the Division Manager of the General Aviation and

knew of the proclaimed injustice of the agreement between Team AeroDynamix and ICAS, such a factor would not be relevant to his determination that appellants had not yet exhausted their potential remedies with the Administrator under FAA Order 8900.1.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellants' appeal is denied; and
2. The chief law judge's Order Not Accepting Appeals for Lack of Jurisdiction is affirmed.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order.